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Supreme Court of the United States.

OCTOBER TERM, 1931. No. 731.

IN THE MATTER
OF THE
APPLICATION FOR A MANDAMUS ORDER BY SAMUEL S. KOENIG, JOHN J. KNEWITZ AND WILLIAM L. WARD,
Petitioners-Appellants,
against
EDWARD J. FLYNN, SECRETARY OF STATE OF THE STATE OF NEW YORK,
Respondent,
AND
JAMES A. FARLEY, CHAIRMAN OF THE STATE COMMITTEE OF THE DEMOCRATIC PARTY,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR JAMES A. FARLEY, CHAIRMAN, STATE COMMITTEE OF DEMOCRATIC PARTY.

JOHN GODFREY SAXE,
Attorney for Respondent-Intervenor, JAMES A. FARLEY, Chairman, of the State Committee of the Democratic Party.

ROBERT F. WAGNER,
JOHN GODFREY SAXE,
JOHN J. O'CONNOR,
of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 731.

IN THE MATTER

OF THE

Application for a mandamus order by SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, Petitioners-Appellants,

AGAINST

EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent,

AND

JAMES A. FARLEY, Chairman of the State Committee of the Democratic Party, Intervenor-Respondent.

Brief for James A. Farley, Chairman, State Committee of Democratic Party.

Statement.

Certiorari by petitioners from an order of the Court of Appeals of the State of New York, unanimously affirming an order of the Appellate Division, Third Department, unanimously affirming an order of Mr. Justice Ellis J.

Staley, denying petitioners' application for a mandamus order, which would direct the respondent Secretary of State to proceed in accordance with a Concurrent Resolution of the New York Senate and Assembly, dated April 10, 1931.

The facts consist of allegations. They are set forth in a petition of the moving parties and in an answer of the Secretary of State. Mr. Farley, Chairman of the State Committee of the Democratic Party, intervenor, has united in the answer (R. 6).

The petition sets forth the following public records:

Act of Congress of June 18, 1929 (Exhibit A);

President's Message, dated December 4, 1930 (Exhibit B);

Certificate of Clerk of House of Representatives to Governor of State of New York, dated March 4, 1931 (Exhibit C);

Concurrent Resolution of the Senate and Assembly, dated April 10, 1931 (Exhibit D).

The answer is as follows:

By way of denial:

(a) The Act of Congress of June 18, 1929, is challenged to the extent of alleging that the Federal provisions as to Congressional Reapportionment are regulated by sections 3 and 4 of the Act of Congress of August 8, 1911, as well as by the 1929 Act, and that both are now in full force and effect.

(b) The admission of the Concurrent Resolution is limited to the fact of its adoption, in form pleaded.

The answer contains two separate defenses which adopt most of the allegations of the petition. In the first defense, the following records are also pleaded:

Constitution of the United States, Article I, section 4;
Act of Congress of August 8, 1911;
The United States Code, Title II, Chap. 1, Secs. 3-4;
New York Laws of 1911, Chap. 890, as amended.

It also sets forth the essential difference, under the New York Constitution, between the enactment of a Law and the passage of a Concurrent Resolution.

In the second defense, it is alleged, in appropriate language, that the Concurrent Resolution did not redistrict the State of New York in compliance with Act of Congress of 1911. Denials in paragraphs 12 and 13, raising the same issue, were withdrawn at Special Term (R. 6).

This application thus presents the meaning and interrelation of a variety of Constitutional provisions, Acts of Congress, New York statutes and a Concurrent Resolution. Our Statement, therefore, will summarily present the questions of constitutional, statutory and decision law involved, rather than follow the usual form of a discussion of facts.

I. The Constitution of the United States was signed on September 17, 1787. It was ratified by the several States between December 7, 1787, and November 21, 1789.

Article I, Section 4, provides as follows:

"The times, places and manner of holding elections for senators and representatives, shall be *prescribed in*

> *each State by the legislature thereof;* but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

At the outset, attention is respectfully called to the fact that any question of construction has to do with the complete phrase, "prescribed in each State by the Legislature thereof", and not merely with the single word "Legislature".

Our First Point will be that this Court in two adjudicated cases has conclusively determined that the phrase "prescribed in each State by the Legislature thereof" means *legislation* in each State by *whomsoever each State* has determined to be *its law-making body.*

> Davis *v.* Ohio, 241 U. S. 565 ("the Hildebrant case");
>
> Hawke *v.* Smith, 253 U. S. 221.

And that it follows, under New York law, as determined by its highest Court, that the Concurrent Resolution is a nullity and ineffective for any purpose.

> Matter of Doyle, 257 N. Y. 244.

Thus, in the instant case, the Court of Appeals held:

> "The wording of section 4, Article I, *very likely suggested* that the action by the State Legislature under it should be *in the form of a law.* It was to be more than an assent by the people of the state to some federal proposition and more than a choice by them of a federal representative. The legislative act was to be a direction to the people of the state demanding certain things to be done, fixing a time, a place and a

manner which had to be followed. From the Legislature was to come a mandate, the disobedience of which would result in penalties or legal consequences. Naturally this would be effected in the same way as all other like mandates. *The action of the Legislature would therefore be in the form of a law.* Section 4 says that the times, places and manner shall be "prescribed" by the Legislature. *"Prescribed" means to lay down authoritatively a rule of action.* From time immemorial this has been done by a law according to the forms existing at the time. *That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Such a direction must take the form of law.* Likewise, in section 4, we find that Congress may exercise the power given to the State Legislature, and when it makes its regulations, it shall do so 'by law.' The matter being dealt with in section 4 is the time, place and manner of holding elections for representatives. *Whether these details be fixed by the Legislature of the state or by Congress, they are to be fixed by law.* If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it in the same way. This, at least, has been the interpretation given to this section for over 140 years, and it is too late now to overturn it.

There is a distinction to be drawn between the functions of a Legislature, such, for instance, as choosing senators, making application to the Federal Government for protection against invasion, ratifying a constitutional amendment, consenting to a purchase of state lands—there is, I say, a difference between these functions of the Legislature and the prescribing or enacting of a rule or direction, which must be followed and obeyed by the people of the state, called the law-making power; such, for instance, as dividing the state

into congressional districts and directing the people where, when and how to vote. We find such a distinction referred to in McPherson *v.* Blacker (146 U. S., 1), State *ex rel.* Davis *v.* Hildebrant (241 U. S., 565), Hawke *v.* Smith (253 U. S., 221), United States *v.* Sprague (282 U. S., 716), although these cases did not pass upon the point here in question (see also Matter of Doyle, 257 N. Y., 244). We conclude, therefore, that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the state is null and void."

It is urged that this decision, in so far as it defines the law making power *of New York State,* is a finality.

Davis *v.* Ohio, *supra,* p. 567, subdiv. 1.

Our Second Point will be that since the State Legislature heretofore duly enacted certain statutes to wit, the Election Law and Chapter 890 of the Laws of 1911, the Senate and Assembly were without power to deal *with those statutes* by Concurrent Resolution. A law is enacted only by the votes of a majority of all the members elected to the Senate and to the Assembly, with the approval of the Governor. A Concurrent Resolution may be adopted by a majority of a quorum of each House, and does not call for the approval of the Governor (R. 63). It is our contention that, even if the phrase "prescribed in each State by the Legislature thereof" might be held to be sufficiently broad to authorize either the initiating body, on the one hand, or the whole law-making body as determined by the New York Court of Appeals on the other, to prescribe the boundaries of congressional districts, the fact that the law-making body in 1911 duly enacted a statute, requires, in

and of itself, that if repeal or amendment be sought, it is the law-making body which must act again.

Matter of Doyle, *supra*, pages 259, 261-2.

The Court of Appeals dealt with the first two questions as one. In its recital of facts, it said, in part:

> "Following the census of 1910 Congress enacted the Thirteenth Apportionment Act, in August of 1911 (vol. 37, U. S. Statutes at Large, chap. 5, p. 13)
> * * *
>
> *Thereafter, and in accordance with this act of Congress, New York State passed an act known as chapter 890 of the Laws of 1911, which became a law on October 18, 1911, with the approval of the governor. It read: "For the election of representatives in Congress of the United States, this state shall be and is hereby divided into forty-three districts, namely—" The districts were then described, and it wound up by stating that all acts inconsistent with this law were repealed.*
>
> Thus the matter stood. Representatives were elected in this state from the congressional districts described in this state law of 1911, up to and until the present time. Another census was taken, pursuant to an act of Congress passed June 18, 1929. This act not only provided for the taking of the census, but also provided for the increase or decrease in state representation according to the results of the census. The total number of representatives was not to be increased. * * * It provided for the apportionment of 433 representatives among the various states according to population as indicated by the census, but in no way indicated how the number of representatives allotted to each state should be chosen. The previous Appor-

tionment Act of August 8, 1911, in sections 3 and 4, above quoted, made such a direction, but it is lacking in this later Act of June 18, 1929. Upon the certificate of the President to Congress, followed by the certificate of the clerk of the House, all in accordance with the provisions of the Census and Apportionment Act of June 18, 1929, New York became entitled to 45 representatives instead of the 43 apportioned to it under the Act of 1911. This was an increase of two. How are the two to be elected?

The New York Legislature determined that it could be done by a joint resolution, and on April 10, 1931, divided the state into 45 congressional districts in this manner. The concurrent resolution, not being a law, was, of course, not submitted to the governor for his approval pursuant to the constitution of this state. This method of electing congressmen is here challenged on two grounds: First, because the Legislature must redistrict the state by a duly enacted law, and not by resolution, and second, if this be not so, the Act of Congress, August 8, 1911, is still in force and effect."

The Court continued:

The Constitution of the United States, Article I, section 4, provides: "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the Legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

By the Constitution of the State of New York, Article III, section 1, the legislative power of the state is vested in the senate and assembly. *"The law-making power, however, includes control or supervision by the*

governor, in so far as it is provided by Article IV of the constitution, section 9, that:

"Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal and proceed to reconsider it. If after such reconsideration two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the governor." * * *

Shortly, thereafter, follows the excerpt heretofore quoted, ending with the words:

"We conclude therefore that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the state is null and void."

The Court of Appeals concluded its opinion as follows:

"With this expression of our opinion, we hold that the resolution of April 10, 1931, is without effect; that 43 of the 45 congressmen are to be elected according to the districts created by chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire state. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the state into 45 congressional districts."

It is urged that this decision, in so far as the Court of Appeals has held that a statute may not be repealed or amended by concurrent resolution, is a finality.

Our Third Point has to do with federal statutes.

Sections 3 and 4 of the United States Code of Laws in force on December 7, 1925 (Vol. I, p. 18, Title 2, Chap. 1) read as follows:

> "Sec. 3. Election by districts. In each State entitled under this apportionment to more than one Representative, the Representatives to Congress *shall be elected by districts composed of a contiguous and compact territory,* and *containing* as nearly as practicable *an equal number of inhabitants.* The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."
>
> "Sec. 4. Additional Representatives at large. *In case of an increase in the number of Representatives in any State* under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts prescribed by law on August 8, 1911, *until such State shall be redistricted in the manner provided by the laws thereof* and in accordance with the rules enumerated in section 3; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts prescribed by law on August 8, 1911, until such State shall be redistricted as herein prescribed."

These two sections were taken from Act of Congress of August 8, 1911, Sections 3 and 4, which we annex to this brief as an "Appendix".

We contend:

(1) That the Concurrent Resolution of April 10, 1931, violated the provisions of section 3 that the representatives of the Congress should be elected by districts *composed of a contiguous and compact territory and containing, as nearly as practicable, an equal number of inhabitants.*

(2) That the Concurrent Resolution also violated the provision of Section 4 that, in case of increase, redistricting shall be prescribed "in the manner provided *by the laws thereof*"; in other words, that redistricting by Concurrent Resolution is not redistricting "by law".

Section 3 is the only statute in existence, applicable to all the States in the United States, which requires that, in each State, the Legislatures in redistricting shall follow equitable rules. It may be that the Courts of some States, in the absence of statute, possess inherent power to void reckless and unfair redistricting. This is indicated in the opinion of the Court of Appeals. But certainly the only uniform statute on the subject is section 3, and so long as that statute continues, each State Court has only to determine the single question whether its Legislature has complied with that statute. Here, therefore, as in the Appellate Division and Court of Appeals, we will devote the greater part of our argument to the proposition that that statute is in full force and effect.

The Court of Appeals upheld this contention, saying:

> "Even if this were not so, we would be inclined to hold that the Act of Congress, August 8, 1911, was still in force and effect as a regulation to be followed in providing for the election of an additional number

of representatives. Section 3 of that act certainly is a general provision which practically can apply to any increase or decrease in the number of representatives. Section 4, while in terms limited to the apportionment under the Act of 1911, also provides and enacts a general rule which may be adapted to subsequent changes in the number of representatives, the rule being that additional representatives are to be elected at large and the others according to existing laws. This is simple, direct and universal. The Act of June 18, 1929, did not touch these matters, made no reference whatever to the provisions enacted in sections 3 and 4 of the Laws of 1911. The number of representatives in any given state was automatically readjusted upon the certificate of the President after each census. This was the only thing accomplished by the Act of June 18, 1929. We do not think that Congress intended to repeal the Act of 1911 or thought that it would terminate upon the passage of the subsequent act. The two should be read together, if possible. One provided for the method of election and the other merely for the number of representatives. The two can be read together as a fair and reasonable regulation by Congress for the election of its representatives, and this is the view we shall take of it."

POINTS.

FIRST.

Article I, Section 4 of the Constitution has been authoritatively construed by this Court.

I. As to this Point, we respectfully urge that no new question is presented for decision. This Court has construed the phrase, "prescribed in each State, by the Legislature thereof", to contemplate "legislative action", and has decided that, under that Article, each State may conclusively determine what body or officers or people comprise "the Legislature thereof", exercising "the legislative power", and has held that "legislative action" is called for by Article I, Section 4, and that that is "entirely different" from the use of the term Legislature in Article I, Section 3 or in Article V.

Ohio *v.* Davis, *supra;*
Hawke *v.* Smith, *supra.*

1. The Davis or Hildebrant case had to do with an Ohio redistricting statute. Under the Ohio Constitution, the law-making body of the State consists of the Legislature, in the restricted use of that term, the Governor *and the people upon a referendum.* The Legislature had passed the Act and the Governor had approved it, *but the people, upon a referendum, had disapproved it.* The Supreme Court of Ohio held that "while Article I, Section 4, of the United States Constitution is controlling upon the States in so far as it grants the legislature of the State authority

to prescribe the times, places and manner of holding elections, this is the *quantum* of the federal grant" and "the *character of the legislature, its composition and its potency as a legislative body*" are among the powers which, by Article X of said Constitution, are "expressly reserved to the states respectively, or to the people." Hence, "under the reserved power * * * the people *may create any agency as its lawmaking body,* or impose on such agency any checks or conditions under which a law may be enacted and become operative"—with the result that Article I, Section 4, *"should be construed as conferring" the power of redistricting "upon such bodies as may from time to time assume to exercise legislative power."*

State *v.* Hildebrant, 94 Ohio State, 154.

In this Court, as appears from the opinion of Mr. Chief Justice White, appellants challenged the decision that the Ohio referendum *was "a component part" of "the legislative authority" "empowered to deal with the election of members of Congress,"* and based their contention on (1) the State Constitution and laws, (2) *"the Constitution of the United States, especially Section 4 of Article I"*, and (3) the Act of Congress of August 8, 1911.

This Court overruled these contentions, and in affirming the Ohio Court disposed of each of the three claims separately.

2. The Hawke case had to do with the ratification of the 18th Amendment. It was an injunction suit, to enjoin a referendum upon a vote of ratification by the General Assembly. A demurrer was sustained in all the Ohio

Courts, the Supreme Court citing and relying upon the Davis or Hildebrant case, and arguing, in effect, as petitioners argue in this case, that the word "Legislature" should be given the same construction whether used in Article I, Section 4 or Article V. Judge Wanamaker, in a concurring opinion, went so far as to say (p. 398) that there is but one way to sustain the judgment against the referendum and that is "by reversing the Hildebrant case".

Hawke *v.* Smith, 100 Ohio State 385.

This Court reversed, but in so doing carefully distinguished between Article I, Section 4 and Article V, and made this distinction luminously clear.

Mr. Justice Day declared (p. 229) that the argument that a referendum was necessary for approval of a constitutional amendment "is fallacious in this—*ratification* by a State of a constitutional amendment is *not* an *act of legislation* within the proper sense of the word. It is *but the expression of the assent of the State* to a proposed amendment."

This Court made the following distinction (p. 230):

"The *power to legislate* * * * is derived from the people of the State."

"The *power to ratify* * * * has its source in the Federal Constitution. The *act of ratification* by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

Referring to Ohio *v.* Davis, it held that case to be "inapposite". It distinguished it by saying (p. 230):

> *"It dealt with Article I, Section 4 of the Constitution."*

And finally, in language which could be no more certain, it concluded as follows (p. 231):

> *"Article I, Sec. 4, plainly* gives authority to the State *to legislate* within the limitations therein named. Such *legislative action* is *entirely different* from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In *such expression, no legislative action* is authorized or required."

Mr. Justice Day also pointed to the distinction between redistricting and electing Senators, saying (pp. 227-8):

> "Article I, Sec. 3, provided that senators shall be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth amendment which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people *was entirely distinct from legislative action* is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election."

In Davis *v.* Ohio, Mr. Chief Justice White used the following terms:

"the legislative power"; (four times)
"the legislative authority"; (four times)
"State legislative power".

Similarly, in Hawke *v.* Smith, Mr. Justice Day used the following terms:

(p. 228) "Legislative action"
(p. 229) "Act of legislation"
"Ordinary business of legislation"
(p. 230) "Ordinary cases of legislation"
"Power to legislate"
(p. 231) "Such legislative action"
"No legislative action"

II. As the Attorney General will show in his brief, it appears that from the date of the adoption of the Constitution down to 1931, the continuous and uninterrupted practice in all the States has been to accomplish the legislative act of redistricting by statute, initiated by bill and approved by the Governor (where a State Constitution so provides), in precisely the same manner that any other statute is enacted into law. This has been the continuous and uninterrupted practice in New York—until the Senate and Assembly, in 1931, saw fit to attempt a radical departure from the time-honored precedent by passing the Concurrent Resolution—as shown by:

New York Laws of 1789, Chap. 11,
" " " " 1792, " 5,
" " " " 1797, " 62,
" " " " 1801, " 64,

New York Laws of 1802, Chap. 72,
" " " " 1804, " 19,
" " " " 1808, " 170,
" " " " 1812, " 120,
" " " " 1818, " 126,
" " " " 1821, " 84,
" " " " 1822, " 250,
Revised Statutes, Part I, Chap. II, Title III,
Laws of 1832, Chap. 334,
" " 1842, " 325,
" " 1851, " 499,
" " 1862, " 454,
" " 1872, " 619, (Passed over Governor's veto),
" " 1873, " 798,
" " 1883, " 424,
" " 1892, " 295,
" " 1901, " 591,
" " 1902, " 298,
Consolidated Laws, Chap. 57, (Chap. 298, Laws of 1909),
Laws of 1911, Chap. 890,
" " 1915, " 340,
" " 1917, " 797,
" " 1917, " 799,
" " 1918, " 34,
" " 1918, " 250,
" " 1922, " 636.

This Court, as early as 1837, dealing with another instance of the power reserved by the States, declared that "a uniform course of action, involving the rights to the exercise of an important power by the State Governments,

for *half* a century" *"is no unsatisfactory evidence that the power is rightfully exercised"*.

Briscoe *v.* Bank, 36 U. S. (11 Peters) 256, 318.

In the venerable case of

Stuart *v.* Laird, 5 U. S. (1 Cranch) 298, 308,

it was held:

> "This practical exposition is *too strong and obstinate* to be shaken or controlled. *Of course,* the question is *at rest,* and *ought not now* to be disturbed."

III. Our learned adversary, in his oral argument before the Appellate Division, suggested that we contended that, at the time the Constitution was adopted, there was doubt in the meaning of the phrase, "prescribed in each State by the Legislature thereof". We, in answering, challenged counsel's statement and denied that we took that position. We assert it to be certain that, from the earliest times, the phrase in question was construed to contemplate legislative action by whomever each of the several States at that time and from time to time should determine to be its law-making body. In that connection, we referred the learned Appellate Division to the Federalist, and to Judge Story's Treatise on the Constitution, which as to this particular subject matter is in great part taken from the Federalist. We had had before us the briefs in Davis *v.* Ohio, wherein counsel relied heavily upon Judge Story's statements and we quoted from Judge Story's work at considerable length in our brief.

The Federal Constitution nowhere seeks to interfere with the States with respect to the distribution of legisla-

tive powers in the State. Not a line can be found in the Federal instrument interfering with the full power of each State to distribute the legislative powers as it may see fit. The Legislature of a State may consist of one House, two Houses, or either one or two Houses in conjunction with the Governor, or one or two Houses in conjunction with the Governor or a referendum to the people. In New York, it consists of Senate, Assembly and Governor.

Matter of Doyle, *supra.*

When Section 4 of Article I was adopted, there was no contention over the question how to get the expression of the State with reference to the election of representatives. The Legislature, however composed, represented the supreme will of the State and its sovereign power and in leaving the question to the Legislature of a State it was leaving the question to the State itself.

This section attracted little attention in the Convention. It was, however, assailed by opponents of the Constitution, both in and out of the State Conventions, with uncommon zeal and virulence. The objection was not directed to that part of the clause which vested in the Legislature of each State the power of prescribing the times, places and manner of holding elections, *because, to that extent, it was a surrender of power by the Federal Government to the State Governments.* The objection was directed to the second clause, which reserved a superintending power in Congress to make or alter such regulations. It was said that such a superintending power would be dangerous to the liberties of the people and to the just exercise of their privileges in Congressional elections.

Story on the Constitution, Vol. I, Sec. 815.

Thus, in the Davis case, counsel before this Court pointed out that, if those who violently assailed Section 4 of Article I of the Constitution because of its second clause and not because of its first clause, had had in mind that the phrase "by the Legislature thereof" contained in the first clause, involved any limitation whatsoever upon the State beyond the law-making power, it is reasonable to assume that such limitation would also have been violently opposed. If it had been understood that the expression "prescribed in each State by the Legislature thereof" had a restrictive meaning, it is wholly inexplicable that the opponents of the Constitution in the various State Conventions did not challenge the first clause quite as vigorously as they challenged the second. A contention to the contrary, if carried out, would be that the Federal Government, by virtue of Section 4 of Article I of the Constitution, would have the right to determine for each State what its Legislature is. It was not the policy of the Constitution to restrict the people of a State in the exercise of their wish to limit the legislative power, either by a Revision Commission or by the Governor, or by a referendum, or otherwise.

IV. We are proceeding with the preparation of our brief without the benefit of first having seen appellant's brief. Our arguments therefore relate to their briefs in the State Courts. Their arguments below appear to be substantially as follows:

They commence with Article I, Sec. 4, and the following quotation from Mr. Justice Day's opinion in Hawke *v.* Smith:

> "That (the word 'legislature') was not a term of uncertain meaning when incorporated into the Con-

stitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people."

They argue that the language used in Article I, Section 4, was not "in accordance with laws established by the respective States", and continue:

"The reason is clear," and they set forth the constituents of the various State Legislatures at the time the Federal Constitution was adopted, and argue that since, in a majority of them, the Governor at that time did not have the power of approval or veto, the phrase must have been used in a restricted sense, (1) even though this Court has held that it meant the whole law-making body and (2) even though, in New York and Massachusetts at least, the Legislature was not the whole law-making body.

They thus "seize upon" (Staley, *J.*) a single quotation from Mr. Justice Day's opinion in the Hawke case *at a point when he was discussing Article V; not* Article I, Section 4. That is not this case. Mr. Justice Day held that that is not this case. His meaning is found in what the Court actually held, explained by such phrases as:

"*Ratification by a State* is not *an act of legislation.*"

"*Article I, sec. 4, plainly* gives authority to the State to *legislate*".

"*Such legislative action* is *entirely different* from" ratification of a Constitutional Amendment.

They have also argued that "there is no escaping the conclusion that the word 'Legislature' as used in Section 4 of

Article I * * * means precisely the same thing as it means in Section 3 of Article I of the same document" (choosing United States Senators).

The question is rather what *basis* is there for this "conclusion" of the petitioners; it is not a question of "escaping".

As a matter of fact, there is no basis at all for this conclusion; because this Court, in Hawke *v.* Smith held otherwise (*ante*, p. 16).

It is indisputable that the words (1) "the Congress" and (2) "Legislature" are used in different senses in the federal Constitution, either (1) as the whole law-making Department or (2) as Senate and House of Representatives alone or State Senates and Houses alone. By analogy, the New York Constitution usually uses the word "Legislature" as the whole law-making body, but it occasionally uses the term in the limited sense of the Senate and Assembly alone—Unquestionably, each use of the word must be determined for itself, if not already determined, as here; and the test which this Court has applied has been, What is the *function* of the body under the particular constitutional mandate?

The distinction is to be found in the Constitution itself.

The House of Representatives represents *the people*.

The Senate of the United States represents *the various States*.

A State Legislature in "prescribing the times, places and manner of holding elections for representatives" is acting for the people, and its prescribing of districts is a law-making function and is to be exercised in the same manner in which all other laws are enacted. The Legislature in

"choosing Senators" acts as a body of voters exercising a power prescribed by the Federal Constitution and not as a law-making body at all, as Judge Story observes.

In one case, as this Court has held, the Legislature is exercising a legislative function; and the fact is that for over a century in each State the entire law enacting body has acted by law. In the other case, the House or Houses are merely called upon to answer a roll call—clearly exercising no part of a law-making function. For instance, when a bi-cameral body is called on "to choose" a United States Senator, the members of both houses vote for their choice as a single body,—which would be wholly unconstitutional in the case of passing a bill.

SECOND.

The New York Senate and Assembly was without power, by Concurrent Resolution, to repeal Chapter 890 of the Laws of 1911, as amended, or the Election Law.

I. In New York State, the "Legislature", considered as Senate and Assembly, has never been the law-making body of the State. Counsel for the petitioners, in their briefs in the State Courts, conceded that New York, by its Constitution of 1777, provided for a "Revision Commission", which had jurisdiction "to return" a proposed law. That Commission included the Governor. In 1821, the New York Constitution abolished the Commission and conferred on the Governor alone the power to approve or disapprove all

bills. In Matter of Doyle, the Court of Appeals said (p. 261):

> "In the State of New York the "law-making" department is not the Legislature alone, but the Legislature and the Governor, the one as much as the other *an essential factor in the process.* We beg the question when we argue that the Legislature may give immunity because the Legislature is the sole custodian of the legislative power. *It is not the sole custodian of that power. Power is divided between the Legislature and the Governor."*

And it summarized its decision as follows:

> "The Legislature can *initiate,* but without the action of the Governor it is *powerless* to *complete."*

We have already pointed out that, in New York State, for over one hundred years, every Congressional reapportionment has been "prescribed" by the law-making Department, that is, by bill "initiated" by Senate and Assembly and "completed" by the Governor by executive approval.

The latest of these statutes, thus enacted, was Chapter 890 of the New York Laws of 1911. That Act *repealed* all prior laws (Sec. 3). It has been frequently amended *by law* (Laws of 1915, Chap. 340, Laws of 1917, Chap. 797, 799, Laws of 1918, Chap. 34, 250, Laws of 1922, Chap. 636).

Statutory provisions as to congressional districts and elections are also contained in the Election Law.

See Election Law, Secs. 21, 69, 131, sub-div. 1, 276-8, 298.

The Concurrent Resolution, on which petitioners rely, is designed to totally supersede Chapter 890 of the Laws of 1911, and conflicting provisions of the Election Law, although it generously recites that "provisions of the Election Law, in so far as they are *not* inconsistent * * * shall *continue* in force *until repealed!*"

The Court of Appeals passed on this 1911 State Apportionment Act in People *ex rel.* Fitzgerald *v.* Voorhis, 222 N. Y. 494.

It said (p. 497):

> "After the apportionment thus made it at once became and thereafter continued to be *the duty of the legislature* of the State of New York to comply with the act by dividing the state into forty-three congressional districts in the manner prescribed. *This it did by the act of 1911,* but its power was not thereby exhausted nor its duty fully performed. *It still remained obligated* to keep the state so divided into congressional districts that members thereafter elected should be from districts composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants. *The language used in the congressional act indicates as clearly as anything can that Congress in its enactment took into consideration the fact* that after a state had once been divided into congressional districts, by reason of shifting population, it might, from time to time, become necessary to redistrict it in order fully to comply with the intent and purpose of the act. *The division directed to be made was not only for the sixty-third, but 'each subsequent Congress'*".

The framers of the Concurrent Resolution did not include an *express* repeal of this statute and its amendments. They attempted, by Resolution, *to write a different law!*

In Matter of Doyle, the Court of Appeals further said (p. 259):

> "Never has it been held that *a legislature* alone may suspend the criminal *law* * * *. The rule is said to be that a *resolution* of the House of Commons is invalid and of no effect *if in conflict with existing law* * * *. *We cannot bring ourselves to believe that the efficacy of resolutions is any greater in New York.*"

and again (pp. 261-2):

> "The grant of an immunity *is* in very truth *the assumption of a legislative power* and *that is why* the legislature, *acting alone,* is *incompetent* to declare it. It is the assumption of a power to annul as to individuals or classes *the statutory law* of crimes, * * * All these changes *may be wrought through the enactment of a statute.* They may be wrought *in no other way* while the legislative structure of our Government continues what it is."

It is our claim that *the repeal of Chapter 890 of the Laws of 1911, and the pertinent sections of the Election Law* "may be wrought through the enactment of a statute. *They may be wrought in no other way while the legislative structure of our government continues what it is.*"

II. Our learned adversary, in his oral argument in the Appellate Division, argued in words and substance:

> "I have tried to explain to my opponents, both in my argument before Judge Staley and here, that I am

> not claiming that the State and Federal Acts of 1911 were repealed or superseded. My claim is that the State Act of 1911 and the Federal Act of 1911 were *temporary* acts which have *expired*."

It is not claimed that these acts have been slain by express repeal nor lulled into a last sleep by implied repeal or implied substitution, but that they are of a temporary and evanescent nature, and quite simply, no longer exist.

We will deal with the Federal Act in Point Third. The nature of a State Apportionment Act has been defined by the Court of Appeals.

Rumsey *v.* The People, 19 N. Y. 41.

There, the Court held (p. 50):

> "It was undoubtedly incumbent upon the Legislature to reorganize the districts, as soon as that might be done after the State census. But if that body was remiss in performing that duty, its tardiness would not, nor would any of its effects, so operate as to repeal a pre-existing statute predicated upon a supposition that there would be punctuality in conforming to the exigencies."

As the learned Attorney General has pointed out:

> "The language there used might be almost written for the instant case."

We urge, with great respect, that the provisions of the State Constitution and the State decisions herein referred to are decisive upon the point that this State statute and the Election Law may not be amended by mere concurrent resolutions and hence, as held by the Court of Appeals, must be still in full force and effect.

THIRD.

Act of Congress of 1929 did not repeal secs. 3 and 4 of the Act of Congress of 1911, nor the U. S. Code.

I. In approaching this question, let us, in the first place, make it clear that the Congress, in connection with each new census and apportionment, has dealt and may deal with three entirely different subjects:

Subject No. 1, Census.

Subject No. 2, Apportionment, or number of representatives of the several States *in the House*.

Subject No. 3, Provisions governing the various State Legislatures in prescribing elections *within* the several States.

II. We propose to show in detail how the Acts of 1911 and 1929 dealt with these three subjects, and to what extent, but before proceeding to do so, we present the following Table:

Subject of Legislation	*Act of 1911*	*Act of 1929*
ubject 1. Provisions for a Census:	Not a word!	21 out of 22 sections.
2. Provisions for the number of representatives which each State shall have in the House:	Secs. 1-2 Table of States with numbers of representatives.	Pending Congressional le lation, sec. 22 provide formula for figuring a ra
3. Provisions governing the Legislatures of the several States in districting:	Sections 3-4. The only law on this subject, now part of the U. S. Code,—being the provisions which appellants here ask the Court to hold to be no longer in existence.	*Not a word!*

III. The Act of 1929, which is printed in the record (Exhibit A) did *not* contain any provision *expressly re-*

pealing Sections 3 and 4 of the Act of 1911 (Appendix, *post,* pp. 46-48) or of the U. S. Code (*ante,* p. 10).

Sections 1 to 21 of the Act of 1929 provided for a new *census.* Section 22 provided for *a new formula* for what may be called a Presidential apportionment.

Moreover, the Act of 1929, in dealing with apportionment (Subject No. 2), expressly provides for its own repeal by providing that it is only to be effective if the Congress *"fails* to enact *a law apportioning* Representatives among the several States".

So far as we can see, the several States today are operating under the entire statute of 1911, prescribing four hundred and thirty-three members (*post,* p. 46), *the sole variance being that, until a new statute has been passed, which has not yet been passed, there should be a new formula for dividing these four hundred and thirty-three members between the several States upon a new ratio based on a new census.*

Moreover, Section 22 of the 1929 Act explicitly distinguishes between "a reapportionment" by Congress, *i. e.,* "a law apportioning representatives among the several States", and an automatic change in the number of representatives *"based upon the method* used in the last preceding apportionment" (R. 31).

Incidentally, it is to be noted that Section 3 of the U. S. Code and the Act of 1911 specifically look to the future, and use the words "the Representatives to the Sixty-third *and each subsequent Congress, etc."!*

Rumsey *v.* The People, *supra.*

The only word in Sections 3 and 4 of the U. S. Code or Act of 1911 which might indicate that those provisions died with the temporary suspension of Sections 1 and 2 (dealing with a different subject) is the word "this" in the phrase "under this apportionment", which appears in both sections.

Subjects Nos. 2 and 3, are dealt with in the Act, *by separate sections,* Sections 1 and 2 dealing with Subject No. 2 and Sections 3 and 4 dealing with Subject No. 3.

The word "this" in the phrase "under this apportionment", is a word either of description or of limitation. *So far as the Act of 1911 is concerned,* it made no difference, because it applied to that Act in either event. The question before the Court is whether the word limits the operation of the Act of 1911 to the numerical distribution of representatives made by that Act or may extend to a redistribution by Executive action based on that Act, pending a Congressional reapportionment. It is our position that, in determining such a question, the word "this" should be construed as one of description.

Coyle *v.* Oklahoma, 221 U. S. 559, 567;
People *v.* Worden, 187 N. Y. 322, 326-7;
Brown *v.* City, 241 N. Y. 96, 110-111.

As to implied repeal or substitution, the rule as laid down by this Court is emphatic. Where one act follows another in point of time, it is ordinarily and usually held to supersede *only* such previous legislation as is *inconsistent, even though a literal construction might indicate a complete substitution.* This is because "repeals by implication are *not* favored and when two statutes cover in whole or in part

the same matter *and are not absolutely irreconcilable,* effect should be given, *if possible,* to *both* of them."

U. S. *v.* Greathouse, 166 U. S. 601, 605;
U. S. *v.* Lee Yen Tai, 185 U. S. 213, 221;
Washington *v.* Miller, 235 U. S. 422, 428;
Graham *v.* Goodcell, 282 U. S. 409, 425.

1. In U. S. *v.* Lee Yen Tai, this Court held (p. 221):

"In the cases of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both *if by any reasonable interpretation* that can be done; that 'there must be a *positive repugnancy* between the provisions of the new laws and those of the old; *and even then the old law is repealed* by implication *only pro tanto,* to the extent of the repugnancy'; and that if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be".

2. This Court, in Graham *v.* Goodcell said (p. 425):

"Section 3 of the latter act does not expressly repeal section 611 of the Revenue Act of 1928, and the question is whether there is a repeal by implication * * * Repeal will not be implied unless there is *a positive repugnancy* between the provisions of the new law and those of the old * * *".

IV. But, our learned adversaries admonish us (*ante,* p. 27), their claim is not of implied repeal or substitution, but of death of that which was only temporary.

We make two answers:

1. The question as to whether a temporary statute has died *is* the question whether there has been implied repeal or substitution.

2. Sections 3 and 4 were not temporary provisions, and Congress made its intent plain that it did not repeal them.

For these propositions, we will first cite two well considered authorities, and will then deal with a subject teeming with interest—The express intent of Congress, as seen by (1) the history of the bill, (2) Senate Report and (3) House ruling.

The authorities on which we rely are:

U. S. *v.* Gear, 44 U. S. (3 How.) 120;
The Reform, 70 U. S. (3 Wall.) 617.

1. In U. S. *v.* Gear, the question was whether an Act of 1834 required the President to cause to be offered for sale public lands containing lead mines. It was argued that Section 5 of an Act of 1807 was still in force, which would not require the President to cause the lands to be sold. This Court sustained that contention. Its decision is important, both on the point that the Act of 1807 was not a temporary statute, and also on the incidental point (which we urge) that the questions of temporary statute and implied repeal are essentially one and the same. This Court held (p. 131):

> "In truth, the acts of 1834 and 1807 do not present a case of conflict in the sense in which statutes do, when, from some expression in a later act, it may seem that something was intended to be excepted from the force of the former, *or to operate as a partial repeal of it.* The rule is, that a *perpetual* statute, (*which all statutes are unless limited to a particular time,*) until *repealed* by an act professing to repeal it, or by a clause or section of another act *directly bearing in terms* upon the *particular matter* of the first act, notwithstanding

an implication to the contrary may be raised by a general law which embraces the subject-matter, *is considered still to be the law in force as to the particulars of the subject-matter legislated upon,"*.

2. The Reform had to do with an Act of 1861, to provide for the collection of duties on imports. That act provided that, on proclamation by the President, intercourse was made unlawful between citizens of those parts of the United States in insurrection with citizens of the rest of the United States, *"so long as such condition of hostility should continue"*. This Court held that that was not a temporary act. It said (p. 629):

> "Respondents are correct in supposing that a forfeiture incurred under a penal statute, temporary in its terms, cannot be enforced after the statute has expired, and that the repeal of a penal statute has the same effect, unless the repealing law contains a saving clause as to pending prosecutions. Many authorities were cited in support of these propositions; but it does not seem to be necessary to give them much examination, as the propositions are elementary and undeniable. Granting all this, however, still it is quite evident that the motion cannot prevail, because the act of Congress under consideration was not a temporary act, as assumed by the respondents, nor has it ever been repealed. *On the contrary, it is a general law without any limitation as to its duration,* and is still in full force for the recovery of penalties, or for the enforcement of forfeitures incurred during the insurrection, and before the termination of hostilities. *Restrictions upon commercial intercourse were limited to the period of the continuance of hostilities; but there was no limitation as to the duration of the act of Congress.* Ces-

sation of hostilities restored the right of commercial intercourse; but the restoration of such intercourse *could not have the effect to repeal* the act of Congress which suspended such intercourse during the continuance of hostilities, or to exonerate a vessel or cargo from a forfeiture incurred for a violation of the restrictions while they were in full operation."

We now come to the express intent of Congress.

It will be found:

(1) That, in sharp contrast to the Act of 1911, the first twenty-one sections of the Act of 1929 are devoted to Subject No. 1, Census, a subject not dealt with by the Act of 1911;

(2) That it devotes a single section, section 22, to Subject No. 2, an addendum to the Census Act, and so far as Subject No. 2 is concerned, it differs from the Act of 1911, in that it does not set forth a Schedule of States, with numbers of representatives, but merely provides a formula for human activity, for ascertaining a ratio for dividing the total representation prescribed by the 1911 Act which the several States shall have in the House after the Census should be taken, or as the Senate Committee reported: "a new application of these fixed indices to the new enumeration" (*post*, p. 39).

(3) *Most particularly, the Act of 1929 does not deal, or purport to deal, in any way, shape or manner with Subject No. 3!*

We respectfully urge that, under such analysis, the Act of 1929 can not be a "substitute" for the Act of 1911 or impliedly "repeal" it.

Let us, however, clinch our point by exhibiting the following legislative *facts*:

(1) In 1929, the record of Congress for the past nine years had been that Congress had refused to translate the 1920 census into a new apportionment. The Senate Committee on Commerce, in a report, dated April 23, 1929, said:

> "As a result, great American constituencies have been robbed of their rightful share of representation, not only in the Congress itself, but also in the Presidential Electoral College. * * * So large a factor of misrepresentation is a travesty upon representative democracy, a flagrant mockery of constitutional equalities, an ugly hazard to domestic tranquility, and an insufferable affront to victimized states."

(2) Something over a year prior to this report, on December 5, 1927, Representative Fenn had introduced in the House a bill, numbered HR393, entitled as follows:

> "A BILL to provide for the Fifteenth and subsequent decennial censuses."

That bill was a census bill, consisting of nineteen sections. The first eighteen of these sections, for all practical purposes, are substantially the same as the first twenty sections of the Act of 1929, subsequently adopted, *and Section 19 of the bill, having to do with repeal, was absolutely identical with Sections 21 of the Act of 1929* (R. 30).

It was also absolutely identical with Sec. 34 of the Census Act of 1919 except that the Act repealed is the Census Act of 1919, instead of the Census Act of 1909.

Of course, Section 19 (now Section 21) *at that time* referred to census provisions and census provisions only, and it may be noted at this point that, during the long and weary pilgrimage of the bill through the House, Senate and back to the House again, that section, whether numbered 19 or 21, was never amended *and never lost its appropriate place in the bill or in the law immediately following the census sections!*

(3) On May 2, 1928, H. R. 393 was reported by the House Committee on Census; on May 21, 1928 it passed the House, on May 22, 1928, it was referred to the Senate Committee on Commerce, and on December 12, 1928, it was reported by the Committee; *and during all this period it still remained strictly a Census bill.*

(4) On April 22-23, 1929, a bill was introduced in the Senate, numbered S. 312, committed to the Committee on Commerce and reported. The Committee's report upon S. 312 says:

> "The part of the bill relating to the census is substantially the same as the bill which passed the House last session."

That disposes of the first twenty-one sections. There was only one other section, Section 22 (R. 30-32).

The title of the bill was changed by *adding* the words, "and to provide for apportionment of representatives in Congress", so that the whole title read:

> "An Act to provide for the fifteenth and subsequent decennial census, and to provide for apportionment of representatives in Congress."

(5) The only thing, therefore, which remains to be considered is new Section 22, which the Senate tacked on to the complete Census bill as an addendum.

This addendum provided merely for individual action by officers of Government, and provided only *for a formula* for determining *the ratio* of representatives from the several States in Congress (Subject No. 2). It provided that that individual action and that that formula should become operative *only if Congress should fail to enact a new apportionment act* specifically enumerating the various States and their respective number of representatives (R. 31).

The Committee on Commerce, in its report accompanying the bill, set forth, as above quoted, the scandalous condition of misrepresentation *in the House itself* (Subject No. 2), which had arisen by reason of the failure of Congress to act for the intervening nine years since the last census had been taken.

The meaning and intent of new Section 22 is luminously set forth in the Committee's report:

> "Need for the bill.
>
> " * * * The Federalist Papers, oracle of the Constitution, said: 'A power equal to every possible contingency must exist somewhere in the Government.' Without this proposed legislation, where is the 'power' to compel effective attention to the serious 'contingency' created by the failure of Congress to apportion Representatives as the Constitution requires? Where is the 'power' which shall protect the paramount theory of representative equality in our system of constitutional government? The 'power' is lacking until this law is passed.

What is Proposed?

The theory of this legislation, as originated by the House in the last session, is that in every decennium the Congress shall have a free opportunity—as is its right and responsibility—to translate the current census into a new apportionment on whatever basis it pleases.

There is no disposition or *effect in this law which delimits freedom of action by Congress* in this respect. *This law does not operate unless Congress fails to act.*

In other words, it takes from Congress nothing except *the right of inertia—the privilege of capitalizing inaction into a constitutional affront.*

Even then *it accepts whatever decisions Congress itself may have last made* as to the size of the House or the mathematical method of apportionment, *and fits these indices to the new census enumeration.*

It preserves the status quo in every respect except as the *new census* requires, under the Constitution, a *new application* of *these* fixed indices to the *new enumertion* * * * .

The primary purpose of this proposal is to cure a basis statutory flaw and cure it with *a formula* which will be just as applicable in 1940 or 1950 or 1960 as in 1930. * * *

Objections.

The objection that this is an improper 'delegation of power' to the Department of Commerce (which takes the census) and to the President (who reports the arithmetic) is answered by an examination of the facts. No power whatever is delegated. The Department of Commerce counts the people (as it always has done) and the President *reports upon a problem in mathematics* which is standard, and *for which rigid*

specifications are provided by Congress itself, and to which there can be but one mathematical answer. Congress always has and always will depend upon outside experts to do this mathematical problem. The usual situation in this respect is not changed. * * *"

Committee reports stand on a "solid footing".

Duplex Co. *v.* Deering, 254 U. S. 443, 474;
Caminetti *v.* U. S., 242 U. S. 470, 490.

They may be taken as a "guide" to "true interpretation",

Oceanic Navigation Co. *v.* Stranahan, 214 U. S. 320, 332.

The report just quoted makes it positive that the *sole purpose* of new Section 22, added to the Census bill, was *to deal with Subject No. 2*, and by so dealing, *to remedy, by a new and conditional expedient, a public scandal which had persisted for nine years.*

It further appears that the statute itself contemplated that Congress itself should act by a specific apportionment act (like Sections 1 and 2 of the Act of 1911) and that, if it did so, Section 22 was to be void.

We respectfully urge that this new conditional expedient of individual action and the provision for a new formula to cure the scandal as to Subject 2 could not, in the nature of things, alter a wholly different subject (Subject 3), to wit, how the Legislatures of the several States should prescribe for districting within their several boundaries.

(6) We will not attempt to give the whole history of S. 312 in the Senate or subsequently in the House of Representatives. The bill passed the Senate, for all practical

purposes, in the same form as it was introduced in the Senate; it was debated in the House, and was sent to at least two conference Committees of Senate and House.

In the House, the bill was actively debated for about five days. Except for a single proposed amendment, it clearly appears that no member of the House was under any misapprehension at any time that the proposal had anything to do with Subject No. 3. Members discussed the scope of the census, the time of taking it, the question of aliens, civil service, unemployment and the radio.

At only one point was the application of the bill to Subject No. 3 raised or discussed, and that was when Congressman Reed twice offered an amendment *to expressly permit a State Legislature to redistrict by Concurrent resolution!* What should be particularly noted follows:

(a) Congressman O'Connor made the point of order that the Reed amendment was *"not germane to the bill"! In other words, his point of order was that the Congress was not legislating as to Subject No. 3.* The Chair *sustained* the point of order! The effect of that ruling was to hold that Congress was not dealing with Subject No. 3.

(b) Congressman Reed reoffered his amendment in slightly modified form. During the debate on this offer, it was suggested that perhaps the bill might in some way repeal the provisions of the Act of 1911 as to Subject No. 3. Here, however, the Chair made it absolutely positive that this could not be, ruling as follows (Congressional Record, Vol. 71, Part 3, pages 2444-5):

> "On Tuesday last the Chair ruled upon this same amendment when offered at another point, and stated

> that *there is nothing in the present bill which relates to the subject matter of the amendment,* which subject matter is *the action of the State Legislature and of State authorities in redistricting* a State upon the basis of a reapportionment of members of the House made by Congress. No argument has been made today which controverts the position which the Chair took at that time. *The Chair takes it that no one is prepared to claim that there is anything in the bill pending before us—S. 312—which directly relates to the matter of the redistricting of the States* * * *. It seems to the Chair *very clearly* that the amendment offered by the gentleman from New York (Mr. Reed) is *not germane to the pending bill;* and the Chair sustains the point of order."

In this ruling, the Chair declares in effect that the House was unanimous that there was nothing in the bill which related to State redistricting.

We respectfully urge that that cannot be repugnant (*ante,* p. 32) which is "not germane"?

The plain purpose of Congress in tacking Section 22 on to this Census bill was to deal with Subjects 1 and 2 and not with Subject 3, and we urge that a Law dealing with such subjects can hardly be held to be "a substitute" for sections of a prior Act, in so far as it deals with a different subject altogether, or that it repeals them.

V. The appellants have not relied on the repeal clause set forth in section 21.

(1) This repeal provision is the familiar Census repeal provision (*ante,* p. 36), having direct relation to census

and census only, and it was carefully continued in the same place in the law when the new provision having to do with the apportionment was subsequently tacked on. It clearly relates to the Census provisions.

(2) But, even if this were not so, this Court has construed such provisions as "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed" as follows:

(A) It is quite inadmissible to predicate upon such express declaration of legislative intent an implication of more extensive repeal!

(B) By necessary implication, previous statutes that *are consistent* with its provisions must be held to be *unaffected!*

Hendersons Tobacco, 78 U. S. 652;
Hess *v.* Reynolds, 113 U. S. 73, 79;
Holden *v.* Minnesota, 137 U. S. 483, 491;
Kennedy *v.* United States, 265 U. S. 344.

VI. The Court of Appeals sustained our contention as to this question. The Appellate Division did not deal with it, except for Mr. Justice Hill's statement, in his concurring opinion (R. 123), that "the Federal Act of 1911 by its terms was limited to the apportionment following the 13th Census". Mr. Justice Staley, however, discussed it. He stated that "after the Census of 1910—the Thirteenth Census—the Congress, in accordance with its custom following other Censuses, passed an Act which apportioned the members of the House of Representatives among the several States". We admit that in order to avoid recurring decennial *mis*representation of the several States in the

House, this *should* be the custom; but the fact is (1) that Congress never passed an Apportionment Act following the *Fourteenth* Census, and that (2) the Act of 1929 did not *follow* the *Fifteenth* Census, but was the Census Act itself, plus a formula to provide a ratio IN CASE CONGRESS SHOULD NOT PASS THE VERY APPORTIONMENT ACT TO WHICH THE LEARNED TRIAL JUSTICE APPARENTLY REFERRED, BUT WHICH NEVER YET HAS BEEN PASSED!

The learned Justice further stated that the provisions of the Act of 1929 were "limited by its language to the apportionment under the Thirteenth Census", and therefore "has no force or application to an apportionment under the Fifteenth Census" (R. 97). Here, again, he falls into the same error; but, in addition, groups together, in a single sentence, the two entirely distinct subjects of legislation which made up the Act of 1911, and ignores the fact that the "Census and Formula Act of 1929" does not deal, or purport to deal, in any way, shape or manner, with one of these subjects, to wit, Congressional limitations governing the Legislatures of the various States in prescribing districting within the States. It should be recorded, however, that at the time of the argument before him, we had not had time to digest the bills, records and documents in Congress and were not in a position to present to him the arguments or decisions herein presented.

FOURTH.

We ask that the order appealed from be affirmed.

Washington, March 24, 1932.

JOHN GODFREY SAXE,
Attorney for Respondent-Intervenor,
James A. Farley, Chairman of the
State Committee of the Democratic
Party.

ROBERT F. WAGNER,
JOHN GODFREY SAXE,
JOHN J. O'CONNOR,
of Counsel.

APPENDIX.

Act of Congress of August 8, 1911.

CHAP. 5.—An Act For the apportionment of Representatives in Congress among the several States under the Thirteenth Census.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as Follows:

Alabama, ten.
Arkansas, seven.
California, eleven.
Colorado, four.
Connecticut, five.
Delaware, one.
Florida, four.
Georgia, twelve.
Idaho, two.
Illinois, twenty-seven.
Indiana, thirteen.
Iowa, eleven.
Kansas, eight.
Kentucky, eleven.
Louisiana, eight.
Maine, four.
Maryland, six.
Massachusetts, sixteen.
Michigan, thirteen.

Minnesota, ten.
Mississippi, eight.
Missouri, sixteen.
Montana, two.
Nebraska, six.
Nevada, one.
New Hampshire, two.
New Jersey, twelve.
New York, forty-three.
North Carolina, ten.
North Dokota, three.
Ohio, twenty-two.
Oklahoma, eight.
Oregon, three.
Pennsylvania, thirty-six.
Rhode Island, three.
South Carolina, seven.
South Dakota, three.
Tennessee, ten.
Texas, eighteen.
Utah, two.
Vermont, two.
Virginia, ten.
Washington, five.
West Virginia, six.
Wisconsin, eleven.
Wyoming, one.

SEC. 2. That if the Territories of Arizona and New Mexico shall become States in the Union *before the apportionment of* Representatives *under the next decennial census* they shall have one Representative each, and if one of such Territories shall so become a State, such State shall have one Representative, which Representative or Representatives shall be in addition to the number four hundred

and thirty-three, as provided in section one of this Act, and all laws and parts of laws in conflict with this section are to that extent hereby repealed.

SEC. 3. That in each State *entitled under this apportionment* to more than one Represenative, the Representatives to the Sixty-third *and each subsequent Congress* shall be elected *by districts* composed of *a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.* The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

SEC. 4. That in case of *an increase* in the number of Representatives in any State *under this apportionment* such additional Representative or Representatives shall be elected by the State at large and the other Represenatives by the districts *now prescribed by law* until such State shall be redistricted *in the manner provided by the laws thereof* and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts *now prescribed by law* until such State shall be redistricted as herein prescribed.

SEC. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

Approved, August 8, 1911.